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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 218

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,

Appellant,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, CHAIRMAN AND STATE LEGISLATIVE REPRESENTATIVE, AND ILLINOIS COMMERCE COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

APPELLEES' STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

While the above entitled cause is admittedly one of which this Court, under the Statutes, has technical jurisdiction on a direct appeal from the Supreme Court of the State of Illinois, these appellees assert that the unsubstantial character of the grounds upon which appellant relies is so apparent as to warrant the Court in summarily

disposing of the appeal at this stage of the proceedings upon a motion to dismiss or affirm under the provisions of Rules 7 and 12 of this Court as recently amended.

In view of the appellees' said position, this statement is respectfully submitted, and a motion to dismiss or affirm is included herein.

Corrections in and Additions to Appellant's Statement of the Facts.

Preliminary Statement.

The appellant's preliminary statements respecting the various procedural steps taken before the Illinois Commerce Commission and in the various Illinois courts are correct and adequate, as are also its statements respecting the technical jurisdiction of this Court, the various Illinois statutes involved, the date of the various orders and the taking of this appeal, and the timely and adequate presentation of the various Federal questions involved in the Illinois courts and their rulings thereupon.

With respect to the appellant's statement as to the facts, however, many of appellant's statements are inaccurate and wholly without support in the record, and appellant has omitted many facts which are not only favorable to these appellees but, we contend, are such as to sustain the order from which this appeal is prosecuted.

Corrections in Appellant's Statement.

Beginning at the top of page 6 of appellant's jurisdictional statement, appellant has considerable to say to the effect that it is impossible to cut off or couple a caboose on the bridges in the middle of the river, that as a practical proposition the necessary effect of the Illinois Commerce Commission's order is to require the appellant to carry its cabooses across the Mississippi River into

Missouri on West-bound cuts and to put cabooses on its trains in Missouri on the East-bound cuts in order to comply with said order, and that the Supreme Court of Illinois has found the facts to be as so stated by the appellant. From this counsel concludes that the order in question not only directly impedes, hinders and delays interstate commerce, but requires compliance in the State of Missouri where the Illinois Commission admittedly has no power, jurisdiction or authority.

As stated by appellant, this is inaccurate, insufficient, inadequate and rather misleading.

Counsel fails, for example, to point out that the evidence shows that on the approach to the Eads Bridge on the Illinois side there are two cross overs (Tr. 2-141), that on the approach to the Merchants Bridge on the Illinois side there is one cross-over (Tr. 2-28), that it would be quite possible to add other cross overs on these bridges in the State of Illinois (Tr. 2-29), and that before the tracks enter the tunnel on the Missouri side there is an interval of some 500 feet (Tr. 2-108).

While it may well be that the *cheapest* and therefore *most practical* way to comply with the order in question would be to leave the caboose attached to a train after it had left Illinois going West, and to attach a caboose on an East bound train before leaving Missouri, it does not follow that the necessary effect of said order is to require compliance in the State of Missouri.

At pages 6-7 of appellant's statement, counsel states that

> "The furnishing of cabooses has always been considered a working condition and has been dealt with as such by appellants and its switchmen, and cabooses have always been and are being furnished by reason of written contracts between the Brotherhoods and appellant (Tr. 2-114, 115)."

This is inaccurate. The record in no wise sustains counsel's statement that the furnishing of cabooses has been considered a "working condition" and the balance of his statement is misleading in that it fails to make it clear that cabooses were furnished only on certain runs and at certain times of the season.

Counsel's statements, at pages 7-8 of the statement, respecting appellant's evidence as to the delays and costs to result from the order requiring cabooses fails to point out that the testimony in question was the purest kind of hearsay, and was, in a large measure, based on information acquired by the witness second hand from various railroad officials. For example, appellant's witness testified (Tr. 2-198):

> "When I say there is a delay of one hour in the Pennsylvania yard, I do not know that of my own knowledge. I am taking their word for it."

His estimate of a 40 minute delay and $10.00 cost per run was likewise without factual basis in the record, and his estimate of a $400,000 outlay for the first year was of the same incompetent character.

At page 8 of the statement, counsel briefly summarizes the testimony of the Commission's expert witness and says that his testimony was that

> "the initial cost of new cabooses would be $44,000 per year and the extra annual expense in wages about $62,000, but this estimate did not include anything except wages (Tr. 2-123)."

This is neither fair nor accurate. In the first place, his estimate for the cost of cabooses was *not* $44,000 *per year*. It was a *total investment* of $44,000 in new cabooses. In the second place, this estimate was based on 36 new cabooses at a cost of $1,233.69 each (Tr. 2-266) which is the cost esti-

mated not by the appellee but by the appellant itself (Tr. 2-241). In the third place, the annual extra expense in wages for those handling the added cabooses was estimated at $27,777.22, not $62,000.

Counsel also fails to point out that these estimates given by the Commission's expert were not hearsay, but were the result of ten or fifteen days spent by the witness in appellant's yards riding the various cuts in company with railroad officials. (Tr. 2-122-125).

Furthermore, counsel's statement that the "delay would average 11 minutes per run" is not correct. The testimony was that the "handling time" would be 11 minutes per run, which would actually result in perhaps only 3 minutes "delay" per run (Tr. 2-126).

Counsel's next statement that

> "The Supreme Court of Illinois found that the delay on each run would be from eleven to forty minutes (Tr. 13)."

is likewise not correct. The nearest approach to such a statement in the opinion is to be found at page 412 of 379 Illinois, where the court says:

> "The evidence before the commission as to the amount of time consumed was in conflict, ranging from eleven minutes to forty minutes per movement, although appellant (now appellee) concedes that some time is required to add a caboose to these cuts of cars."

Appellant's next statement to the effect that the rear switchman would be able to use the caboose only from one-sixth to one-eighth of his working period, that during the balance of his time he would be exposed to the same or additional hazards, and that the Supreme Court in its opinion so found is not correct and is not supported by the record.

With respect to the facts sustaining the Commission's order as a reasonable and proper "police power" measure

to protect the lives and limbs of the trainmen and passengers, the statement is completely silent. In our opinion this is unfair and requires us to add such facts so as to have the true record before this Court.

Additions to Appellant's Statement.

The Brotherhood of Railroad Trainmen is an organization representing trainmen and switchmen who are employed by the Terminal Railroad Association of St. Louis, Respondent (Tr. 2-25, 84). The said Respondent is an association which performs terminal services in the switching district of East St. Louis, Illinois, for and on behalf of its proprietary lines and other railroad companies desiring use of its facilities (Tr. 2-211). The corporate control of the said Terminal Railroad Association is vested equally in each of the following railroad companies: The Alton Railroad Company; Baltimore & Ohio Southwestern Railroad Co.; Chicago & Eastern Illinois Railway; Chicago, Burlington & Quincy Railroad Co., Chicago, Rock Island & Pacific Railroad Co.; Cleveland, Cincinnati, Chicago & St. Louis Railway Co.; Illinois Central Railroad Co.; Louisville & Nashville Railroad Co.; Missouri, Kansas, Texas Railroad Co.; Missouri, Pacific Railroad Co.; Missouri Pacific Acct. St. Louis Iron Mountain & Southern Railroad Co.; Pittsburgh, Cincinnati; Chicago & St. Louis Railroad Co.; St. Louis-San Francisco Railway Co.; St. Louis Southwestern Railway Co.; Southern Railway Co.; Wabash Railway Co.

Switchmen are assigned to particular crews. The switchmen make and break up trains in yards, switch industries, make deliveries from connections to the Terminal Railroad Association from through lines and make transfer runs from and to various yards of the Terminal Railroad Association and perform that work in the yards or industries, required to make up trains and couple cars together. They see that

the air brakes are coupled, and in order on the train, and when a train leaves the yard for a destination, the switchmen take their proper positions on the train with the rear man taking his position on the rear car of the train (Tr. 2-27). The rear man is required to ride the rear coupler of the car in the event of overhead and side structures not clearing the man on the top or side of the car (Tr. 2-27). He lines all switches back in a proper position when they have been used by his train and, in case of reverse movement, when a train is shoved, is required to protect street and highway crossings to keep the public from being killed or injured. When shoving a train near-by or on private crossings, he is required to be on top of the rear car, unless prevented by overhead or side structures that do not clear the switchman (Tr. 2-27, 40).

The length of the trains in operation handled by trainmen on one trip vary from one to a hundred cars (Tr. 2-120, 139, 140, 141, 144).

A caboose is a railroad car furnished for the housing of train crews and equipped for their safety. They are needed to avoid side and overhead structures which endanger the life and limb of the switchmen and to provide for them a safer place in case of derailment of the train or sudden jerking or sudden stops which would be liable to throw switchmen from the top, side or end of the car (Tr. 2-29). In case a train breaks in two, it is very dangerous for a man to be on the rear end of the train, as it is easy to be knocked off the top or end by a sudden jerk or stop (Tr. 2-29). It also protects the switchmen from the inclement weather in both winter and summer. During the winter months the hand-holds, drawbars and sill steps of cars are often covered with ice, making it difficult for the switchmen to get on top of a car and making it very easy for said switchmen to be jerked or bumped

off (Tr. 2-29, 30, 56, 84). He could discharge his duties from the interior of the caboose or from the steps outside the caboose (Tr. 2-84).

A caboose also provides a place for the switchmen to keep and carry their necessary flagging equipment, clothing such as rain clothes, coats, etc., and to carry their necessary first aid equipment and lunches and permit the lighting of red lanterns during inclement weather. It is also used to do such clerical work as is necessary when the train is en route (Tr. 2-29, 57). Switchmen can observe their train better while it is en route and watch the side of their train from a caboose. It is hazardous for a switchman on top of a car or on the end of a car to observe the side of his train (Tr. 2-29). A caboose is properly equipped with a whistle and a conductor's valve which permits the switchman on the rear end of the train to have practically the same control of the train that the engineer has with reference to stopping or sounding a warning signal on approaching a highway crossing, etc. (Tr. 2-30, 40). He can perform all the necessary work better from the caboose (Tr. 2-30). Where no caboose is provided, switchmen are required to carry their lunch in their pocket or tie it on if some suitable place can be found (Tr. 2-40).

A switchman can perform the necessary duties better from a caboose in observing the running condition of his train, and in flagging and in getting off and on the rear end of his train, in moving motion, also in shoving or back-up movements of trains (Tr. 2-30).

It is admitted that no cabooses or shelter cabs are provided for any of the crews working out of certain yards herein involved (Tr. 2-227). Cabooses are furnished part of the year on others and furnished in some instances all the year round (Tr. 2-242).

There are various transfer runs *within the confines of the State of Illinois* which go onto the Eads and Merchants Bridges which span the Mississippi River (Tr. 2-251). Most of the overhead and side clearances on these two bridges are insufficient to clear a switchman (Tr. 2-28, 253, 263).

Cabooses are not furnished on most of the transfer runs out of Madison Yard or CD Yard in Illinois moving onto these two bridges. Cabooses are furnished upon certain transfer runs originating in the Wiggins No. 2 Yard, Illinois, and moving onto the Merchants Bridge but only between October 15th and May 1 (Tr. 2-251).

At many points there exist numerous insufficient clearances for a switchman to ride the *top* of the rear car (Tr. 2-43, 46, 47, 49, 53, 72); and the rules of the Terminal Railroad Association expressly provide that the switchmen must ride the top of the rear car (Tr. 2-43); although another rule provides that "riding on the inside of loaded open top cars is prohibited" (Tr. 2-196, 197). Some of these clearances are such that a switchman cannot ride the *side* of the car without being knocked off (Tr. 2-44, 47, 48, 49, 50, 52, 59, 72).

The testimony of one R. B. Thomas, Chief Railroad Inspector for the Illinois Commerce Commission, discloses numerous insufficient vertical and horizontal clearances on various runs, including the runs onto the Eads and Merchants bridges. His reports contain photographs showing the switchmen riding on the rear drawbar of the last car of the train and also showing the various insufficient clearances (Tr. 2-141, 210, 266, inclusive). His testimony clearly shows that the dangers and hazards in question could be eliminated by providing a caboose for the man to ride in (Tr. 2-141).

Often the rear switchman rides the drawbar at the trailing end of the rear car. If the end of the car on which

he was riding happened to be the end that was provided with a break staff, the switchman is required to grasp it as a means to secure himself in place. If no break staff is provided he is required to reach further out towards the side of the car in order to reach the end ladder or other handholds. He is also required to brace himself against the end of the car to avoid being shaken off due to sudden stops and starts. Photographs showing a switchman in riding position and details of footing, etc., will be noted (Tr. 2-227). The appellant admits a very serious accident on the Ehds Bridge to a switchman, Mueller, who was riding on the rear drawbar, when he was jerked off the car and injured (Tr. 2-196, 197).

In many instances the trains move up steep inclines fraught with danger. If cars break off, it is very difficult to stop such cars and to avoid loss of life of the public (Tr. 2-45, 50, 52). The evidence shows many unprotected crossings (Tr. 2-45, 50, 51).

In many instances without a caboose, the switchman is required to stand on the top of the last car in the train while shoving, and facing sleet and snow and rain storms and wind. In such cases the switchmen are unable to see where they are going and are required in many instances to turn their backs for shelter. If this is done such switchmen cannot observe highway crossings or other dangerous points (Tr. 2-30).

In many instances the rear switchman or foreswitchman cannot see the head switchman (45 car lengths away) until the train gets onto a straight road (Tr. 2-34). In some instances it is necessary to shove a train without being able to see. Sometimes the cars break off and roll down and it is impossible to stop them by hand brake, in which case it is necessary for the switchman to run ahead of the cars to protect the public (Tr. 2-34). With the use of a caboose with air brakes properly working, the rear man

would be able to stop in case of such an emergency. A caboose is provided with a conductor's valve (Tr. 2-35), so that he can control back-up movements of his train with an air valve provided on the caboose for the purpose of setting the brakes. He can also, with the whistle that is provided on the caboose, warn the public at or near crossings (Tr. 2-84). The ability of a switchman using a caboose, to stop the cars or warn an approaching train is far greater than it is when he is riding on a drawbar or on the top of a car (Tr. 2-85).

The evidence shows that other railroads operating runs parallel with the appellant operate with cabooses, namely, the Pennsylvania, the runs from Rose Lake to Madison Yards; the Illinois Central; the C. & E. I., Madison, Illinois to East St. Louis, Illinois; the Rock Island Railroad, Madison Yard to East St. Louis, Illinois; the Chicago, Burlington & Quincy at Madison Yard and the C. T. Junction; the Illinois Central; the Big Four from East St. Louis, Illinois to Granite City, Illinois; the Alton Railroad out of Venice to various yards (Tr. 2-39).

The evidence also shows that various other railroads operating over the appellant's tracks in East St. Louis, Illinois District and under substantially the same conditions, have the use of cabooses (Tr. 2-75, 76, 81, 83, 118). As a switchman employed by the Illinois Central testified, "we take a caboose on any run we want a caboose on" (Tr. 2-83).

At the conclusion of the hearings before the Commission, it found that cabooses were necessary on the runs in question because of the operating hazards and dangers to the life, health and safety of the trainmen, employees and the general public and ordered the appellant to furnish such cabooses (Tr. 2-1).

The Circuit Court's Order did not challenge the Commission's findings as to the necessity for cabooses but reversed

the Commission's Order solely on the ground that to order the use of cabooses on such runs as went onto the Eads and Merchants bridges constituted an interference with interstate commerce beyond the power of the Illinois Commerce Commission (Tr. 2-270).

In passing upon the above evidence the Supreme Court of Illinois, at 379 Ill. 403, at pages 405, 406, 411, 420 and 421, said:

> "Appellee (now appellant) is a railroad corporation which performs terminal services in the railroad switching district of East St. Louis, Illinois, and St. Louis, Missouri. Switchmen in its employ are assigned to particular switching crews. These crews make and break up trains in the yards, make deliveries from connecting roads to appellee; make transfer runs from the various yards of appellee to and from industries; make up trains and couple cars together, see that the air brakes are coupled and in order on the train, and when the train leaves the yard for a destination the switchmen take their proper positions on the train, the rear man taking his position on the rear car of the train, where he is required to ride. His duties are to line all switches back into proper position after their use by the train, and in case of a reverse movement, to watch street and highway crossings to protect the public. On some of the transfer runs, side or overhead clearance is insufficient to permit riding on the side or top of the rear car, in which case the rear switchman is required to ride the rear coupler of the car. The length of the trains handled by a crew on a trip varies from one to a hundred cars. A caboose is a railroad car furnished for the housing of train crews and equipped for their safety; provides a place for the crew to carry necessary flagging equipment, raincoats, extra or excess clothing, necessary first aid equipment and lunches; also to do any necessary clerical work. During the winter months, the handholds, draw-bars and sill steps of cars are often covered with ice, making it difficult for switchmen to get to the top of a car or to prevent

being jerked or jarred off. No caboose or shelter cars are furnished to crews working out of certain of the involved yards, though they are furnished from October to May each year on other runs by appellee, and on still other runs are furnished the year round."

* * * * * * *

"The evidence shows that without cabooses or shelter cars, switchmen are required to ride on the outside of the rear car of the cut of cars being moved, and that in many places in the yards and on the bridges, side or overhead clearances are insufficient to permit riding on the side or top of the cars, with the result that the switchman is required to ride upon the coupler, which is dangerous and becomes specially so during storm or winter periods. It is shown that the jarring or sudden stopping or starting of a cut of cars may cause the switchman to lose his hold and be thrown and to suffer injury."

* * * * * * *

"That there is substantial danger to switchmen that can be avoided by these cabooses or shelter cars, seems clear."

* * * * * * *

"We are of the opinion that the order of the commission as a whole was a valid exercise of the police power and that the circuit court erred in setting that order aside."

Statement of the Grounds Upon Which It Is Contended by Appellees That the Federal Questions Involved Are Not Substantial in Character.

I.

The order of the Illinois Commerce Commission was a reasonable police regulation for the protection of the health, lives and safety of persons within the confines of the State of Illinois, and its effect upon interstate commerce was only incidental.

Under Points A and B, counsel for appellant contends that the effect of the order of the Illinois Commerce Commission was to lay a direct and substantial burden upon interstate commerce, from which he concludes that such an order is unconstitutional even though it may not conflict with or be repugnant to any action taken by the Federal Congress.

Under this point we contend that it is clear, under the facts of this case, that the said order requiring cabooses *within the confines of the State of Illinois* was a proper police regulation for the promotion of the health, lives and safety of persons within the confines of said State, and that its effect upon interstate commerce (if any it had) is only incidental in character. From this we conclude that it would only be invalid if in conflict with or repugnant to some action taken by the Federal Congress, and under Point II hereof, we assert that there is no such conflict or repugnancy.

Of course it is the law, as appellant contends at pages 43 and 44 of its suggestions, that if the order purports to lay a *direct* burden on interstate commerce it is invalid even though not in conflict with or repugnant to any action of the Congress, but, on the other hand, it is equally well settled that where a police regulation of a State affects in-

terstate commerce only indirectly it is not invalid merely because of that incidental effect, and only falls where in conflict with some action of the Congress.

This Court, in the case of *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1161, in discussing the distinction between a direct and indirect effect on interstate commerce, at page 307, said:

> "The distinction is *not formal, but substantial in the highest degree*; as we pointed out in the Schechter Case, *supra*, p. 546 *et seq.* 'If the commerce clause were construed,' we there said, 'to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control.' It was also pointed out, p. 548, that 'the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system.'"

In the case of *Chicago, Rock Island and Pacific Railroad Co.* v. *Arkansas*, 219 U. S. 453, this Court brushed aside the contention that the Arkansas Full Crew Law conflicted with the Commerce Clause. After reviewing its prior decisions to the effect that the power to regulate commerce did not of its own force and without legislation of Congress, impair the authority of the states to establish reasonable regulations for the protection of the health, the lives or the safety of their people, the Court, at pages 465 and 466, said:

> "The principles announced in the above cases require an affirmance of the judgment of the Supreme

Court of Arkansas. *It is not too much to say that the State was under an obligation to establish such regulations as were necessary or reasonable for the safety of all engaged in business or domiciled within its limits.* Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the State. Local statutes directed to such an end have their source in the power of the State, never surrendered, *of caring for the public safety of all within its jurisdiction;* and the validity under the Constitution of the United States of such statutes is not to be questioned in a Federal Court unless they are clearly inconsistent with some power granted to *the general government, or with some right secured by that instrument, or unless they are purely arbitrary in their nature.* The statute here involved is not in any proper sense a regulation of Interstate Commerce, nor does it deny the equal protection of the laws. *Upon its face, it must be taken as not directed against Interstate Commerce, but as having been enacted in aid, not in obstruction, of such commerce, and for the protection of those engaged in such commerce* • • •"

"• • • Undoubtedly. Congress, in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce. But it has not done so in respect to the number of employes to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations on that subject, and until it does, the statutes of the state, not in their nature arbitrary, and which really relate to the rights and duties of all within the jurisdiction must control. This principle has been firmly established, and is a most wholesome one under our systems of government, Federal and State • • •"

"*So long as Congress does not occupy the field of regulation under consideration, each state is empowered to regulate in this field with respect to the safety of*

persons in interstate commerce that passes through the State; therefore, it follows that it is immaterial that the various states may or may not enact full crew requirements in so far as the Commerce Clause is concerned. *Any inconvenience that may occur as a result of the various state laws on this subject is immaterial.*" (Italics ours.)

In the subsequent case of *Atlantic Coast Line R. Co.* v. *State of Georgia*, 234 U. S. 280, the validity of a Georgia statute requiring all railroad companies to equip their locomotives with electric headlights was assailed as being an unwarrantable interference with interstate commerce. This Court, speaking through Mr. Justice Hughes, in sustaining the Act in question, at pages 290, 291 and 292, said:

"Finally, it is urged that the statute constitutes an unwarrantable interference with interstate commerce. The locomotive with respect to which the accusation was made was at the time being regularly used in the hauling of interstate freight trains over the company's main line of railroad, and was equipped with an oil headlight. The statute, as the supreme court of the state said, was not directed against interstate commerce, but it was held that it incidentally applied to locomotives used in hauling interstate trains while these were moving on the main line in the state of Georgia. This being so, the act is said to be repugnant to the exclusive power of Congress. It is argued that if Georgia may prescribe an electric headlight, other states through which the road runs may require headlights of a different sort; that, for example, some may demand the use of acetylene, and that others may require oil; and that, if state requirements conflict, it will be necessary to carry additional apparatus and to make various adjustments at state lines, which would delay and inconvenience interstate traffic.

"The argument is substantially the same as that which was strongly presented to the court in *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628, 41 L. Ed.

853, 17 Sup. Ct. Rep. 418, where the plaintiff in error was held subject to penalty for the violation of a New York statute which in substance made it unlawful for any steam railroad doing business in that state to heat its passenger cars, on any other than mixed trains, by any stove or furnace kept inside of the car or suspended therefrom. The railroad company was a Connecticut corporation having but a few miles of road within the State of New York, and operating through trains from New York through Connecticut to Massachusetts. As this court said in its opinion, the argument was made that 'a conflict between state regulations in respect of the heating of passenger cars used in interstate commerce would make safe and rapid transportation impossible; that to stop an express train on its trip from New York to Boston at the Connecticut line in order that passengers may leave the cars heated as required by New York, and get into other cars heated in a different mode, in conformity with the laws of Connecticut, and then at the Massachusetts line to get into cars heated by still another mode, as required by the laws of that commonwealth, would be a hardship on travel that could not be endured.' But the court ruled that these 'possible inconveniences' could not affect 'the question of power in each state to make such reasonable regulations for the safety of passengers on interstate trains as, in its judgment, all things considered, is appropriate and effective.'

In thus deciding, the court applied the settled principle that, in the absence of legislation by Congress, the states are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. That has been the law since the beginning of railroad transportation. It was not intended that, pending Federal action, the use of such agencies, which, unless carefully guarded, was fraught with danger to the community, should go unregulated, and that the states should be without authority to secure needed local protection. The requirements of a state, of course, must not be arbitrary, or pass beyond

the limits of a fair judgment as to what the exigency demands, but they are not invalid because another state, in the exercise of a similar power, may not impose the same regulation. We may repeat what was said in *Smith* v. *Alabama*, 124 U. S. 465, 481, 482, 31 L. Ed. 508, 513, 514, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564: 'It is to be remembered that railroads are not natural highways of trade and commerce. * * * The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the state. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and property demands the use of specific guards and precautions. * * * The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution. (Citing cases.)

"If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced,—if there appears to be need of standardization of safety appliances, and of providing rules of operation which will govern the entire interstate road, irrespective of state boundaries,—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That remedy does not rest in a denial to the state, in the absence of conflicting Federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress, in its control of interstate commerce, to establish such regulations as, in its judgment, may be deemed appropriate

> and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway."

A rather similar situation arose in the case of *Whitney* v. *Johnson*, 37 F. Supp. 65 (statutory three-judge court, 1941), affirmed by this court *per curiam* in 314 U. S. 574, where a Kentucky statute limiting truck weights to 18,000 pounds was attacked on the ground that

> "because of this limitation Kentucky is seriously interfering with interstate commerce. That it is so far out of line with other states from which and to which tonnage must pass, in gross weight permitted to be carried, that there is produced a 'bottleneck' which seriously interferes with the national defense."

The trial court refused to enjoin the enforcement of the Kentucky statute on the ground that it was within the power of the state to regulate such matters, and this Court affirmed.

There, as here, the regulation unquestionably had *some* effect on commerce outside the state, but such effect was merely incidental.

In the recent case of *California* v. *Thompson*, decided April 28, 1941, 313 U. S. 109, 85 L. Ed. 793, this Court reviewed the law and, at page 113, said:

> "As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, *even though the regulation affects interstate commerce.* Ever since *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245, 7 L. Ed. 412, and *Cooley* v. *Port Wardens*, 12 How. (U. S.) 299, 13 L. Ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which be-

cause of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints. See cases collected in *Di Santo* v. *Pennsylvania, supra,* (273 U. S. 40, 71 L. Ed. 528, 47 S. Ct. 267).

"A state may license trainmen engaged in interstate commerce in order to insure their skill and fitness. *Smith* v. *Alabama,* 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564, 1 Inters. Com. Rep. 804; *Nashville, C. & St. L. R. Co.* v. *Alabama,* 128 U. S. 96, 32 L. Ed. 352, 9 S. Ct. 28, 2 Inters. Com. Rep. 238. It may define the size of crews manning interstate trains. *Chicago, R. I. & P. R. Co.* v. *Arkansas,* 219 U. S. 453, 55 L. Ed. 290, 31 S. Ct. 275; *Missouri P. R. Co.* v. *Norwood,* 283 U. S. 249, 75 L. Ed. 1010, 51 S. Ct. 458, 30 N. C. C. A. 639, and prescribe regulations for payment of their wages. *Erie R. Co.* v. *Williams,* 233 U. S. 685, 58 L. Ed. 1155, 34 S. Ct. 761, 51 L. R. A. (N. S.) 1097. It may require interstate passenger cars to be heated and guard posts to be placed on bridges of an interstate railroad. *New York, N. H. and H. R. Co.* v. *New York,* 165 U. S. 628, 41 L. Ed. 853, 16 S. Ct. 418. It may limit the speed of interstate trains within city limits. *Erb* v. *Morasch,* 177 U. S. 584, 44 L. Ed. 897, 20 S. Ct. 819. It may require an interstate railroad to eliminate grade crossings. *Erie R. Co.* v. *Public Utility Comrs.,* 254 U. S. 394, 409, 412, 65 L. Ed. 322, 333, 334, 41 S. Ct. 169, P. U. R. 1921C 143. It may pass local quarantine laws applicable to merchandise moving in interstate commerce as a means of protecting local health. *Morgans, L. & T. R. R. & S. S. Co.* v. *Louisiana,* 118 U. S. 455,

30 L. Ed. 237, 6 S. Ct. 1114; *Compagnie Francaise de Navigation a Vapeur* v. *State Bd. of Health*, 186 U. S. 380, 460 L. Ed. 1209, 22 S. Ct. 811. It may regulate and protect the safe and convenient use of its harbors and navigable waterways unless there is conflict with some act of Congress. *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245, 7 L. Ed. 412, *supra*; see *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261, 267, 80 L. Ed. 215, 219, 56 S. Ct. 194."

The most recent (December, 1941) expression of this Court on this point is that to be found in the case of *Duckworth* v. *Arkansas*, 314 U. S. 390, 62 S. Ct. 311, where this Court, at page 394, said:

"While the commerce clause has been interpreted as reserving to Congress the power to regulate interstate commerce in matters of national importance, that has never been deemed to exclude the states from regulating matters primarily of local concern with respect to which Congress has not exercised its power, even though the regulation has some effect on interstate commerce. As we had occasion to point out at the last term of Court, there are many matters which are appropriate subjects of regulation in the interest of the safety, health and well-being of local communities which, because of their local character and their number and diversity, and because of the practical difficulties involved, may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control over the commerce in matters of national concern and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the commerce clause. Such regulations, in the absence of supervening Congressional action, have for the most part been sustained by this Court, notwithstanding the commerce clause. See *California* v. *Thompson*, 313 U. S. 109, 113, *et seq.*, and cases cited. See also cases collected in

Di Santo v. *Pennsylvania*, 273 U. S. 34, 39, 40, and in *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 188, Note 5, and 191.

* * * * * * *

"Of recent years, the Court has sustained state regulation of the size and weight of motor cars moving interstate, designed to insure the safe and economical use of the states' highways. *South Carolina Highway Dept.* v. *Barnwell Bros., supra,* and cases cited. A state may police 'caravans' of motor vehicles moving over its highways in interstate commerce and charge a compensatory license fee for doing it. *Morf.* v. *Bingaman*, 298 U. S. 407; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583. It may, in the interest of public safety and convenience, restrict particular types of motor vehicles moving in interstate commerce, to particular areas. *Sproles* v. *Binford*, 286 U. S. 374, 393-5; *cf. Clark* v. *Paul Gray, Inc., supra*, 598. And a state may undertake to insure the fitness of those negotiating contracts for interstate transportation, by licensing them and requiring a bond to insure their good behavior. *California* v. *Thompson, supra.*"

The principal case upon which appellant relies is that of *South Covington & Cincinnati Ry. Co.* v. *Covington*, 235 U. S. 537. *The fact is that the Covington case, relied upon by appellant as being conclusive of the issues, in fact actually supports appellees' position herein* and confirms the principles announced in the cases relied upon by us without in any wise changing or modifying or reversing any of them.

An examination of the case discloses that it originated in a petition filed by the South Covington and Cincinnati St. Railway Co. in the state courts to enjoin the City of Covington from enforcing a city ordinance regulating the operation of street cars of the company. The ordinance in question provided (1) that no street car company shall

permit more than one-third greater number of passengers to be transported over and above the number for which seats are provided in the cars; (2) *that the street car company shall not permit any passenger to ride upon the rear platform of any car unless same be provided with a suitable rail or barrier so arranged as to provide an open space reasonably sufficient for egress and ingress of passengers to and from such car (3) that the street car company shall not suffer or permit any person or passenger to ride upon the front platform of any car unless a rail or barrier be provided, separating the motorman from the balance of the front platform (4) that the company shall at all times keep its cars thoroughly cleaned and ventilated and shall at least once a week fumigate the inside of said cars with disinfectant subject to the control of the Board of Health of the City of Covington* (5) that the temperature of the cars shall never be permitted to be below 50° Fahrenheit, and (6) that the street car company run and operate cars in the City of Covington in sufficient numbers at all times to reasonably accommodate the public.

The state courts refused the injunction and dismissed the petition. The testimony showed that the plaintiff was carrying passengers from Covington, Kentucky, to Cincinnati, Ohio, and that the traffic was conducted by means of continuous trips for single fare without change of motormen or conductors. This Court said, page 545:.

> "Reaching the conclusion that the traffic here regulated is of an interstate character, and therefore within the control of the Federal Congress, the further question is presented: Does the case come within that class wherein the state may regulate the matter legislated upon until Congress has acted by virtue of the supreme authority given it by virtue of the commerce clause of the Constitution. *In numerous instances this court has sustained local enactments, passed in the exercise of the police power of the state, in the interest of the*

public health and safety, notwithstanding the regulation may incidentally or indirectly affect interstate commerce. The subject was given most consideration in the Minnesota Rate Cases (*Simpson* v. *Shepard*) 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, 33 S. Ct. Rep. 729, and the previous cases dealing with this subject are therein collected and reviewed. *In the light of these cases, and upon principle, the conclusion is reached that it is competent for the state to provide for local improvements or facilities, or to adopt reasonable measures in the interest of the health, safety, and welfare of the people, notwithstanding such regulations might incidentally and indirectly involve interstate commerce.*" (Italics ours.)

This Court thereafter proceeded to hold that the sections of the ordinance embodied in paragraphs 1 and 6, making it unlawful for the company to permit more than one-third greater number of passengers to ride or be transported in its cars over and above the number for which seats were provided therein, directly affected interstate commerce. The testimony showed that in order to comply with these regulations the plaintiff would require about one-half more than the present number of cars which the company then operated and more cars than it could operate in Cincinnati within the franchise rights and privileges held by the company or controlled by it in that city.

This Court said, page 547:

"*These facts, together with the other details of operation* of the cars of this company are to be taken into view in determining the nature of the regulation herein attempted and whether it so *directly* burdens interstate commerce as to be beyond the power of the State."

It was by reason of these peculiar conditions that this Court concluded that such portion of the ordinance regulating the number of passengers and the number of cars

to accommodate the public was a direct burden upon interstate commerce.

The significant fact, however, is that this Court proceeded to hold that other portions of the ordinance were valid and only incidentally affected interstate commerce and reversing the State courts in that respect, and said (page 548):

> "There are other parts of the ordinance which we are of opinion are *within the authority of the state, and proper subject matter for its regulation;* at least, until the Federal authority is exerted. *These are the provisions with reference to passengers riding on the rear platform unless the same be provided with a suitable rail or barrier, etc., and as to persons riding upon the front platform unless a rail or barrier be provided,* separating the motorman from the balance of the front platform, *as well as those provisions with reference to the requirement to keep the cars clean and ventilated and fumigated. We think these regulations come within that class in which this court has sustained the right of the local authorities to safeguard the traveling public, and to promote their comfort and convenience, only incidentally affecting the interstate business, and not subjecting the same to unreasonable demands. New York, N. H. & H. R. Co.* v. *New York,* 165 U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. Rep. 418; *Lake Shore & M. S. R. Co.* v. *Ohio,* 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. Rep. 465; *Atlantic Coast Line R. Co.* v. *Georgia,* 234 U. S. 280, 291, 292, 58 L. Ed. 1312, 1317, 1318, 34 Sup. Ct. Rep. 829." (Italics ours.)

We submit that there is a close analogy between the requirement in the Covington ordinance requiring the street car company to provide the rear platforms with a suitable rail or barrier and as to persons riding upon the front platform with a rail and barrier separating the motorman from the balance of the front platform and to keep the cars clean, ventilated and fumigated, and the requirement

of the Commission in this case to provide a caboose for the life, health and safety of the switchmen riding thereon. The very purpose of the caboose is to safeguard the employee just as the suitable rail or barrier on the front and rear platforms provided for in the Covington ordinance was to safeguard the traveling public. The mere fact that a caboose might be taken over the Eads Bridge and Merchants Bridge into the State of Missouri is purely incidental, *just as the rail or barrier on the front and rear platforms on the street car would necessarily be taken from* Covington, Kentucky, into Cincinnati, Ohio.

Counsel for appellant erroneously assumes that the distinction between the portion which this Court held valid and enforceable and that which it held to be beyond the power of the city, was due to the fact that the valid portions of the ordinance could be enforced wholly in Covington without necessarily being enforced in Cincinnati, whereas, in the invalid portion, as to the number and amount of cars and number of passengers to be carried, could not be enforced in Covington without also being enforced in Cincinnati.

This was not the basis of the court's decision. The valid portions of the ordinance were sustained on the ground that the local authorities had the right to safeguard the traveling public and promote their comfort and convenience even though it incidentally affected the interstate business, so long as it did not subject the same to unreasonable burdens, whereas, the other portions of the ordinance which were held to be invalid were so held because other factors above discussed existed.

It will be noted that if the City of Covington could require suitable rail or barrier with respect to the rear or front platform of the car, there was nothing to prevent the City of Cincinnati from requiring other safeguards to be erected or installed upon the street cars for the protection of the passengers. This Court undoubtedly had this pos-

sibility in mind since it adverted to this fact in connection with the invalid portions of the ordinance. However, in spite of this possibility, the court, nevertheless, held the provisions pertaining to the comfort, convenience and safety of the traveling public as affecting the interstate commerce *only incidentally* and not subjecting the same to unreasonable burdens.

We submit that the requirement of furnishing a caboose for the protection of the switchmen has no more direct effect upon interstate commerce than the requirement of the Arkansas Full Crew Law, enacted for the public safety, which the Supreme Court of the United States upheld as having been enacted "in aid not in obstruction" of interstate commerce, "and for the protection of those engaged in such commerce," and that "*any inconvenience*" that may occur as a result of the various State laws on this subject is immaterial. *Chicago Rock Island & Pacific Railroad Co. v. Arkansas*, 219 U. S. 453, 466.

There is no material distinction between the requirement of furnishing a caboose in our case and the requirement of the Georgia Statute involved in *Atlantic Coast Line v. Georgia*, 234 U. S. 280, wherein railroad companies were ordered to equip their locomotives hauling interstate freight trains with electric headlights. This Court held that although the locomotive was at the time being regularly used in the hauling of interstate freight trains, the Statute was not directed against interstate commerce but merely indirectly affected interstate commerce.

There, as here, it was contended that if Georgia may prescribe an electric headlight other States through which the road runs may require lights of a different sort and that if the State requirements conflict it would be necessary to carry additional apparatus and to make various adjustments at State lines which would delay and inconvenience interstate traffic.

But the court held that the effect upon interstate commerce was merely incidental and the State was not to be denied its power to protect life and property within its borders.

A similar contention was made in *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628, as to electric headlights which were required by New York law to be installed on interstate trains running from New York City to Boston, Massachusetts, and the court held that these "possible inconveniences" could not affect the question of power in each State to make reasonable regulations for the safety of passengers on interstate trains as * * * is appropriate and effective.

Another case supporting our position, but cited by appellant at page 46 of its statement, is that of *Missouri Pacific Railway* v. *Kansas*, 216 U. S. 262, 54 L. Ed. 472.

In that case "the order of the State Commission directed the putting in operation of a passenger train service between Madison, Kansas, and the Missouri-Kansas State line, on what is known as the Madison branch of the Missouri Pacific Railway Company. The branch road in question lies between Madison, Kansas, and Monteith Junction, Missouri. From Madison to the State line is 89 miles, and from the State line to Monteith Junction is 19 miles, the total distance between the two terminal points being 108 miles. At Monteith Junction the Madison branch intersects with the Joplin line of the Missouri Pacific, by means of which connection is made with Kansas City and other points. There being no terminal facilities at Monteith Junction, the trains operated on the Madison branch do not remain over at the junction, but run as far as Butler station, 3 miles distant on the Joplin line, where terminal facilities exist."

This Court there said:

> "And this brings us to consider the several reasons relied upon to establish, first that the order made by the railroad commission was so arbitrary and unreasonable as to cause it to be void for want of power; or second that the order was void because its necessary operation was to place a direct burden upon Interstate Commerce."

As to the first proposition, the contention was made that the order was arbitrary because the service could not be rendered without a pecuniary loss and the court held that the mere incurring of a loss from the performance of a duty does not, in and of itself, necessarily give rights to the conclusion of unreasonableness, and the court cited and quoted at length from the case of *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co.*, 176 Ill. 512.

The contention was, also, made that the order was unreasonable because it directed the movement of passenger train directed to be run to the state line, where it is said there were no terminal facilities and *that it would have to run the train to a point outside of the state.*

The contention was also made that the order was a direct burden upon Interstate Commerce. Answering that contention the court said:

> "The contention that a burden was imposed upon interstate commerce by causing the train to stop at the state line, where there were no terminal facilities, but in a disguised form reiterates the complaint which we have already disposed of, that the order, because of the direction to stop at the state line, was so arbitrary and unreasonable as to be void. The order cannot be said to be an unreasonable exertion of authority, because the power manifested was made operative to the limit of the right to do so. Besides, the proposition erroneously assumes that the effect of the order is to direct the stoppage at the state line of an inter-

state train, when, in fact, the order does not deal with an interstate train, or put any burden upon such train, but simply requires the operating within the state of a local train, the duty to operate which arises from a charter obligation. It is said that, as the state line may be but a mere cornfield, the great expense must result to the railway from establishing necessary terminal facilities in such a place, it must follow that the road, in order to avoid the useless expense, must operate the passenger service directed by the order, *not only to the state line, but 20 miles beyond*, to Butler, on the Joplin line, where terminal facilities exist. From these assumptions, it is insisted, that the order must be construed according to its necessary effect, and therefore must be treated as imposing a direct burden upon interstate commerce by compelling the operation of the passenger train, not only within the state of Kansas, but beyond its borders. But under the hypothesis upon which the contention rests, *the operation of the train to Butler would be at the mere election of the corporation, and, besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed. Atlantic Coast Line R. Co.* v. *Wharton*, 207 U. S. 328, 52 L. Ed. 230, 28 Sup. Ct. Rep. 121." (Italics ours.)

The court also referred to the *Atlantic Coast Line R. Co.* v. *North Carolina Corp. Commission* case, and said:

"The elementary proposition that railroads, from the public nature of the business by them carried on, and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly, by the legislative authority, or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine."

This court then affirmed the decision of the lower court. This case fully supports the contention of the appellees because of the contention made by the appellant that cabooses as a practical matter will have to be run into the State of Missouri. In our present case the taking of cabooses into Missouri (although our contention is that cabooses on the bridge runs could be changed at the cross overs on the bridges which are in Illinois), would be at the election of the appellant, and as the court said: "Even if the performance of duty of furnishing local facilities in some respects affected Interstate Commerce it does not necessarily follow that thereby a direct burden on Interstate Commerce would be imposed."

In view of these authorities it is respectfully submitted that the order of the Illinois Commerce Commission was a reasonable police regulation for the protection of the health, lives and safety of persons within the confines of the State of Illinois and that its effect, if any, upon interstate commerce was indirect and incidental.

II.

The order of the Illinois Commerce Commission is not repugnant to or in conflict with any action taken by the Federal Congress.

Under Point C, appellant contends that the State of Illinois is without power to require cabooses to be furnished on its trains within its confines because the Congress has taken charge of the entire field of cabooses, although appellant impliedly admits that Congress has *not* specifically legislated respecting the *furnishing* of such cabooses.

Of course, it is well established, as appellant contends, that *if* Congress has purported to take charge of the entire field to the exclusion of the States, they are thereafter without power to legislate within that field.

It is our contention, however, that Congress has not attempted or even purported to take charge of this field, although it has legislated as to certain isolated subject matters within the field. It is our further contention that the order of the Illinois Commerce Commission is not in conflict with any action thus far taken by the Congress, and is therefore entirely valid.

Appellant's principal contention is that the furnishing of cabooses is a "working condition" and that this field was taken over by Congress in its enactment of the Railway Labor Act, and the Interstate Commerce Act.

Both of these contentions are dealt with at length and disposed of adversely to appellant's position in the case of *Missouri Pacific Railroad Co.* v. *Norwood*, 283 U. S. 249, 70 L. Ed. 1010.

In that case two Arkansas statutes, both regulating the number of men to be used in the crews of trains operated within the State of Arkansas (commonly known as Full Crew Laws) were involved. In earlier cases, these two State acts had been assailed as violating the commerce clause of the Federal Constitution and the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This Court, in the cases of *Chicago, R. I. and Pac. Ry.* v. *Arkansas*, 219 U. S. 453, 459, 465, affirming 86 Ark. 412, 111 S. W. 456, and of *St. Louis, I. M. & S. Ry. Co.* v. *Arkansas*, 240 U. S. 518, affirming 114 Ark. 486, 170 S. W. 580, has sustained the validity of the Acts in question as regarded these provisions of the Federal Constitution as amended.

In speaking of its previous holdings in these two cases, the Court, in the later *Missouri Pacific* case, said, at page 252:

> "The court held that the Act of 1907 is not a regulation of interstate commerce and that upon its face it must be taken as having been enacted in aid of, and for the protection of those engaged in, such commerce.

> It said that Congress might have taken entire charge of the subject, but that it had not done so and had not enacted regulations in respect of the number of employees to whom might be committed the management of interstate trains and that until it does the statutes of the State, not in their nature arbitrary, must control. The court found that, while under the evidence there was admittedly room for controversy as to whether the statute was necessary, it could not be said that it was so unreasonable as to justify the court in adjudging it an arbitrary exercise of power. And it held that, being applicable alike to all belonging to the same class, there was no basis for the contention that it denied the company equal protection of the laws. The principles governing that decision were followed in the later case, decided in 1916, which upheld the Act of 1913. Both Acts were sustained as valid exertions of police power for the promotion of safety of employees and others."

This Court, in the cited *Missouri Pacific* case, sets forth the railroad's contentions to the effect that these two Arkansas statutes had been rendered in conflict with and repugnant to Federal law by virtue of the subsequent enactment by Congress of the Interstate Commerce Act and the Railway Labor Act in the following language set forth at pages 252 and 253 of 283 U. S.:

> "The plaintiff says that, since these decisions, Congress has occupied the field and has delegated to the Commission and Labor Board full authority over the subject and that the state laws under consideration are repugnant to the comprehensive scheme of federal regulation prescribed by the Interstate Commerce Act as amended and conflict with sections 1 (10) and (21), 13, 15 and 15a thereof and with the spirit of the Railway Labor Act of 1926."

The Court, at page 256, states the problems thus before it in the following language:

"Has Congress prescribed, or authorized the Interstate Commerce Commission to regulate, the number of brakemen to be employed for the operation of freight trains or the number of helpers to be included in switching crews?"

This Court in overruling the railroad's contentions and in sustaining the validity of the Acts in question, concludes, at pages 256 to 258, as follows:

"In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the States for the regulation of the number of men to be employed in such crews. *Reid* v. *Colorado*, 187 U. S. 137, 148. *Savage* v. *Jones*, 225 U. S. 501, 533. *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 611. Plaintiff, while not claiming the Interstate Commerce Act in terms purports to cover that subject, insists that the Act does give the Commission jurisdiction over freight train and switching crews and so excludes the States from that field. It calls attention to a number of provisions of the Act and maintains that under them the Commission is empowered to regulate the 'practice' of carriers in respect to the 'supply of trains' to be provided by any carrier. But, assuming that the Act does so authorize regulation in respect of such practice and supply, it is clear that the delegation of power would not include the regulation of the number of brakemen or helpers. The act uses the word 'practice' in connection with the fixing of rates to be charged and prescribing of service to be rendered by the carriers, but these matters differ widely in kind from the subject covered by the Arkansas laws. That word is deemed to apply only to acts or things belonging to the same class as those meant by the words of the law that are associated with it. *Baltimore & O. R. Co.* v. *United States*, 277 U. S. 291, 300. The Act does not use that word in respect of any subject that reasonably may be thought similar to or classified with the regulation of the number of men to be employed in

such crews. And it is also clear that there is nothing in the phrase 'supply of trains' or in the purpose of the Act to suggest that by it Congress intended to supersede state laws like those under consideration. The plaintiff further supports its contention by the claim that the Commission is authorized to regulate the expenditures of carriers. That claim is based on the provisions of the Act empowering the Commission to regulate rates to be charged and divisions of joint rates and to ascertain rate levels that will yield the fair return provided for. But manifestly there is no similarity between determining what items of expense properly are to be taken into account in calculations made for such purposes and in the prescribing of the number of employees or the compensation to be paid them. We think it very clear that Congress has not prescribed or empowered the Commission to fix the number of men to be employed in train or switching crews.

"No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that it does not conflict with the Arkansas statutes under consideration."

In the said case, the Court, at page 255, has the following to say regarding the dangers which the said Acts were designed to obviate:

"There is no showing that the dangers against which these laws were intended to safeguard employees and the public no longer exist or have been lessened by the improvements in road and equipment or by the changes in operating conditions there described. And, for aught that appears from the facts that are alleged, the same or greater need may now exist for the specified number of brakemen and helpers in freight train and switching crews. * * *"

We submit that the cited case completely disposes of all of the appellant's contentions here to the effect that the

order in question is such as to be in conflict with or repugnant to any action taken by the Congress.

A very recent (January 11, 1941) case dealing with the general subject of conflict between State action and the action of the Federal government respecting interstate commerce is the case of *Missouri-Kansas-Texas Railroad Co.* v. *Williamson*, 36 Fed. Supp. 607.

There an action was brought by a railroad company against the Attorney General of the State of Oklahoma to enjoin an Oklahoma statute limiting the length of trains within that State. It was contended that this statute burdened interstate commerce, violated the Fourteenth Amendment and conflicted with Federal action in this field.

In holding that regulation of the length of trains was in the interests of public safety, and that the Act did not violate any Constitutional provision nor conflict with any action taken by the Congress, the Court, at page 615, said:

> "But the intent of Congress to exert its superior authority and thus exclude or supersede state legislation concerning the same matter is not to be lightly inferred. It must be fairly manifested. *Reid* v. *Colorado*, 187 U. S. 137, 148, 23 S. Ct. 92, 47 L. Ed. 108; *Savage* v. *Jones*, 225 U. S. 501, 533, 32 S. Ct. 715, 56 L. Ed. 1182; *Atlantic Coast Line Railroad Co.* v. *Georgia*, *supra*; *Southern Railway Co.* v. *Railroad Commission of Indiana*, 236 U. S. 439, 446, 35 S. Ct. 304, 59 L. Ed. 661; *Illinois Central Railroad Co.* v. *Public Utilities Commission*, 245 U. S. 493, 510, 38 S. Ct. 170, 62 L. Ed. 425; *Napier* v. *Atlantic Coast Line Railroad Co.*, 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432; *Atchison, Topeka & Santa Fe Railway Co.* v. *Railroad Commission*, 283 U. S. 380, 392, 393, 51 S. Ct. 553, 75 L. Ed. 1128; *Gilvary* v. *Cuyahoga Valley Railway Co.*, 292 U. S. 57, 54 S. Ct. 573, 78 L. Ed. 1123; c/f *Missouri, Kansas & Texas Railway Co.* v. *Haber*, 169 U. S. 613, 623, 18 S. Ct. 488, 42 L. Ed. 878. And it is within the power of Congress to limit its regulation to only part of a given

field, thus leaving the remainder open to action by the state. *Southern Railway Co.* v. *Railroad Commission of Indiana, supra; Gilvary* v. *Cuyahoga Valley Railroad Co., supra; c/f Napier* v. *Atlantic Coast Line Railroad Co., supra.*

"The acts of Congress relied upon fail to make specific reference to the length of trains as an element of safety, and it is not contended that the Interstate Commerce Commission has acted or asserted its authority to act in respect of the matter under the powers which Congress has delegated to it. True, some if not all of the statutes concern themselves with various aspects of safety in the operation of trains. But, fairly construed, they do not contain any provision from which it can be reasonably implied that Congress intended to exert the paramount character of its authority in relation to the length of trains in such manner as to exclude or supersede state action. And until an intent to exercise such superior authority has been indicated, the state is free to legislate in the exertion of its police power. Compare, *Atlantic Coast Line Railroad Co.* v. *Georgia, supra; Vandalia Railroad Co.* v. *Public Service Commission*, 242 U. S. 255, 37 S. Ct. 93, 61 L. Ed. 276; *Gilvary* v. *Cuyahoga Valley Railway Co., supra.*"

Although appellant's counsel also mentions the car service provision, the Boiler Inspection Act, the Power Brake provision of the Safety Appliance Act, etc., he does not contend that the order in question actually conflicts with any of these specific provisions.

Counsel's statement to the effect that this Court, in *Penn. R. R. Co.* v. *Public Service Com.*, 250 U. S. 566, *held* that Congress has taken charge, not only of the details of the construction of cabooses, but also of the question of whether they shall be carried on trains at all, is absolutely without support in that or any other case to our knowledge.

Counsel's next statement that the furnishing of cabooses has always been treated as a "working condition" is with-

out support in the record, as we have already pointed out in our "Corrections in Appellant's Statement of Facts."

Appellant also contends that the order conflicts with the powers granted the Interstate Commerce Commission because the railroad may have to issue securities to finance the purchase of the cabooses in question. There is no evidence in the record to show that the appellant would have to borrow any sums of money to comply with the order, or issue any evidence of indebtedness which would have to be submitted to the Interstate Commerce Commission for approval. Furthermore, as hereinafter shown, the actual cost of furnishing the caboose is comparatively nominal.

But irrespective of this fact, the Transportation Act has no application to a situation of this kind, as evidenced by the very cases relied upon by appellant.

In *Railroad Commissioner* v. *Southern Pacific Company*, 264 U. S. 331, 68 L. Ed. 713, relied upon by counsel, the Railroad Commission of California had required certain railroads to build an interstate union depot for the City of Los Angeles. In order to comply the railroads would have been required to extend their lines and remove certain other tracks in order to properly connect with the Union depot. The Supreme Court called attention to the fact that the order there involved required the abandonment of available sites, the extension of main lines and terminals and alterations costing from $25,000,000 to $45,000,000.

The Supreme Court held that the Transportation Act did not prevent the state commission from making reasonable regulations which did not involve abandonment of sites, extensions of main lines and material changes in the lines of the carriers.

The court said, page 345:

> "It may well be that a mere relocation of a main track of an interstate carrier which does not involve a real addition to, or abandonment of, main tracks and

terminals, or a substantial change in destination, does not come within Pars. 18 to 21. One might, too, readily conceive of railroad crossings or connections of interstate carriers in which the exercise by a state commission of the power to direct the construction of merely local union stations or terminals without extensions of main tracks and substantial capital outlay should be regarded an ordinary exercise of the police power of the state for the public convenience, and would not trench upon the power and supervision of the Interstate Commerce Commission in securing proper regulation of an interchange of interstate traffic or passengers. *Only a lawful order of the Interstate Commerce Commission would raise a question of the power of a state commission* in such cases, as the proviso of p. 17, Chap. 402, of the Transportation Act, shows:

> "*That nothing in this act shall impair or affect the right of a state in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under* the provisions of this act." (Italics ours.)

It was further contended in that case that the order of the state commission involved such a heavy burden in the erection of a new union station and the main track changes and extensions and other accessories which would require the three railways involved to issue new capital securities, and this could not be done without the approval of the Interstate Commerce Commission.

The court, however, said at page 347:

> "To be sure, this provision *only becomes operative when securities have to be issued, and would not, of itself, prevent action by a state commission until such securities are seen to be necessary* . . ."

We submit that there is no evidence in the record in any wise showing that appellant will be required to issue any securities by reason of the provisions of the order of the Illinois Commerce Commission, hence the action of the state commission was not in any wise prevented by the provisions of the Transportation Act.

We respectfully submit that Congress has not invaded the field and has in no wise divested the states of their inherent power to protect and safeguard their inhabitants.

Even had Congress enacted a statute conferring regulatory powers upon a federal agency this would not, in itself, nullify the authority of the states to protect and safeguard their inhabitants under the police power. Eicholz v. *Public Service Commission of Missouri*, 306 U. S. 268; *Welch* v. *New Hampshire*, 306 U. S. 79; *Kelly* v. *Washington*, 302 U. S. 1; *Northwestern Bell Telephone Company* v. *Nebraska Railroad Commission*, 297 U. S. 471.

The *Northwestern Bell Telephone Company* v. *Nebraska Railroad Commission*, 297 U. S. 471, case involves an appeal from a judgment of the Supreme Court of Nebraska affirming an order of the Railroad Commission of that State directing the telephone company to use for purposes of accounting a depreciation rate fixed by the state commission. The company contended the commission's order was void as in conflict with the Interstate Commerce Act, as amended by the Transportation Act, which conferred upon the Interstate Commerce Commission authority to fix depreciation rates.

It should be noted specific regulatory authority was conferred upon a federal agency to do the identical thing which the state agency was empowered to do. In sustaining the power of the state commission the court said:

> "Both the language of the statute already quoted, and the nature of its subject matter indicate that it contemplated no restriction of state control over de-

preciation rates until the Interstate Commerce Commission had prescribed its own rates. State commissions were not deprived of power to fix rates for intrastate telephone service, in determining which rates of depreciation chargeable to operating expenses play an important part. See *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 78 L. Ed. 1182, 54 S. Ct. 658. The statute did not envisage an immediate adoption of depreciation rates by the Interstate Commerce Commission. A long period might elapse, as the event has shown, before the Commission would be prepared to act. It cannot be supposed that Congress intended by the amendment to Chap. 20 (5) to preclude all regulation, state and national, of depreciation rates for telephone companies, for an indefinite time, until the Interstate Commerce Commission could act administratively to prescribe rates. * * * The Commission has thus prescribed no depreciation rates as required by Chap. 20 (5). *No* exertion of federal authority, through the Interstate Commerce Act, Chap. 20 (5), (6), (7), the order of the Commission or otherwise, forbids the making of entries in appellant's accounts or the doing of anything that is by the state commission's order directed to be done. Pending action by the Communications Commission establishing depreciation rates for telephone companies, state control over such rates remains unimpaired." (Italics supplied.)

In *Kelly* v. *Washington*, 302 U. S. 1, the Supreme Court of the United States sustained the statutes of the State of Washington providing for the regulation of tug boats over navigable waters of the United States, notwithstanding numerous federal statutes also providing for the inspection of various kinds of boats and vessels. In its opinion the Court stated at pages 9 and 10:

"Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to

their territorial jurisdiction although interstate commerce may be affected. *Minnesota Rate Cases* (*Simpson* v. *Shepard*) 230 U. S. 352, 402, 57 L. Ed. 1511, 1542, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann Cas. 1916A, 18. States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, *is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'.*" (Cases cited.) (Italics supplied.)

In the case of *Eichholz* v. *Public Service Commission of Missouri*, 306 U. S. 268, the Missouri Public Service Commission canceled a certificate of an interstate operator for failure to comply with certain regulations of the State. At the very moment the interstate certificate was canceled the trucking company had applied to the Interstate Commerce Commission for an interstate permit under the Federal Motor Carrier Act. The Supreme Court sustained the action of the State commission and said (p. 273):

> "When the commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic upon the state highways had not been superseded."

And at page 274 the Court said:

> "We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the state is free to act in order to protect its legitimate interests even though interstate commerce is directly affected."

In the case of *Welch* v. *New Hampshire*, 306 U. S. 79, the Supreme Court of the United States passed upon the validity of a statute of the State of New Hampshire which provided for the control of the hours of service of drivers of motor carriers. It was contended that the provisions of the New Hampshire Act were superseded by the Federal Motor Carrier Act, 1935, and regulations prescribed under it by the Interstate Commerce Commission. Under the provisions of the Act the New Hampshire Commission had suspended a certificate of the appellant for failure to comply with its orders governing the hours of service of its drivers.

In sustaining the order of the New Hampshire Commission (entered after the enactment of the Federal Act, but before the Interstate Commerce Commission had adopted rules and regulations under it), the Court stated at pages 84 and 85:

> "The sole question is whether Congress intended that from the time of the federal enactment until effective action by the commission, there should be no regulation of periods of continuous operation by drivers of motor vehicles hauling in interstate commerce. Our decisions provide no formula for discovering implied effect of federal statutes upon state measures as that under consideration. * * * The rule applicable is clearly stated in *Illinois C. R. Co.* v. *State Pub. Utilities Commission*, 245 U. S. 403, 510, 62 L. Ed. 425, 38 S. Ct. 170, P. U. R. 1918C, 279: 'In construing

federal statutes enacted under the power conferred by the commerce clause of the Constitution * * * it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as its purpose to do is clearly manifested.' We have frequently applied that principle." (Cases cited.)

In view of the facts in this case and the legal principles applicable thereto, we respectfully submit that Congress has not taken over the regulation of furnishing cabooses and that the order of the Illinois Commerce Commission is not repugnant to or in conflict with any action taken by the Federal Congress.

III.

The expense to which appellant will be put in order to comply with the Commission's order is not so exorbitant, when compared with the obvious benefits to accrue therefrom, as to deprive appellant of its property without due process of law.

Under Point D, appellant contends that the order of the Illinois Commerce Commission is invalid in that the expense of compliance therewith will be so exorbitant, when compared with the benefits to accrue therefrom, as to deprive appellant of its property without due process of law in violation of the 14th Amendment, to the Federal Constitution.

Of course we have no quarrel with the general principles, sustained by the cases cited by appellant, that a State cannot, under the guise of the police power, pass any arbitrary or unreasonable law in violation of the constitutional limitations; or that

"a strong public desire to improve the public conditions is not enough to warrant achieving the desire by a

> shorter cut than the constitutional way of paying for the change."

or that

> "whether this is done with or without due process of law depends upon the special circumstances."

This, however, does not in any wise minimize the power and duty of the State to act under its police powers subject to such limitations for the protection of life, health and safety of its inhabitants.

As the Supreme Court of the United States aptly said, in *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission*, 294 U. S. 613, cited by appellant, referring to the police power of a State:

> "It is the governmental power of self-protection and permits reasonable regulations of rights and property in particulars essential to the preservation of the community from injury."

We submit that the order in question is reasonable and necessary to the preservation of the life, health and safety of the trainmen and the public and does not violate any of the constitutional limitations.

A careful examination of the numerous cases cited by counsel for appellant fails to disclose anything to the contrary. Many of them involved different facts and therefore are not applicable to this case. In cases where the facts were analogous we submit they fully sustain our position.

In determining whether the order entered by the Illinois Commerce Commission is reasonable or arbitrary or in violation of the due process clause, it becomes necessary to examine the facts and circumstances in this case at some length.

In the first place, let us refer to the evidence of the Illinois Commerce Commission's expert.

Mr. R. B. Thomas testified that he was employed as Chief Railroad Inspector by the Illinois Commerce Commission for six years; that he was a high school graduate, graduated from the Michigan College of Mines, with the degree of Bachelor of Mines; that he had about eight years experience with railroads, that is railroad construction, and three years in highway construction; that in his present capacity he has had occasion to make investigations and take photographs, make reports and present evidence before the Commission; and had occasion to observe and make studies with reference to switching operations and transfer runs: That he was familiar with the preparation and interpretation of blue prints and plans; that he prepared approximately 1,000 plans and many thousands of blue prints. That he took thousands of photographs and interpreted them. That he took photographs in connection with his investigation in the present case. That he has had occasion to prepare estimates of cost of railroad facilities. It is interesting to note how thoroughly Mr. Thomas prepared his reports, as shown under the Commission's Exhibits 1, 2 and 3.

It should be noted that counsel for appellant never questioned the qualifications of this expert at the trial of this cause (Tr. 2-120).

Mr. Thomas testified that he spent between ten and fifteen days in the yards in making the investigation with reference to his first report, Commission's Exhibit 1. It must also be borne in mind that this expert used "caboose handling time" in computing the figures in the reports and in estimating the crew's wages, and testified that the actual delay time would be considerably less. Caboose handling time is all of the time consumed in the handling of the caboose. That is to say, an engine picks up a caboose, runs around a train, couples the caboose on a train, returns and couples

to the head end of the train. If it took 11 minutes to make that move, that would be handling time. The caboose delay time "might be less because while the engine was picking up the caboose and coupling the same and returning, other delays might have occurred during that 11 minutes, and consequently the caboose handling time would not always be a complete delay." In other words, if no caboose were used, there might be a delay of 8 minutes because of the coupling of the air or other things that had to be done so that the actual caboose delay time therefore would only be 3 minutes, though the expert charged the entire 11 minutes to caboose time (Tr. 2-126).

Actual cabooses were used in the test runs (Tr. 2-126). The reports dealt with clearances, description of shelter cab or caboose, flagging equipmment and the position of the rear brakeman or switchman, with questions of safety and comfort (Tr. 2-122). On cross-examination by counsel for appellant, Mr. Thomas further testified that if they had had the use of many cabooses instead of the one used, one-third of the actual time could be saved, namely, time shown on page 22 of the report as T—— $4,828.32, would be reduced approximately one-third (Tr. 2-129).

Mr. Thomas further testified that the maximum time shown in the report was based upon allowing extra time for one contingency or another, such as a yard or track being blocked (not caused by the caboose), and that it was not based on actual clock time. It was simply a guess (Tr. 2-129).

Mr. Thomas' initial investigation covered the C. D. Yard (Tr. 2-121). Mr. Thomas then continued the original investigation to cover Madison Yard and Wiggins No. 2 Yard, and the runs originating in those yards and moving to points within Illinois, introduced as Exhibit 2 (Tr. 2-131). Mr. Thomas then continued his investigation to cover the third

section of his report, which was the Eads bridge and Merchants bridge within the confines of the State of Illinois (Tr. 2-136). The report covers various photographs showing physical structures, clearances, surroundings, transfer moves, location and manner in which the switchmen ride those runs on the Eads and Merchants bridges. He also gives a summary of the number of cabooses covered by the report, also the amount of crew wages for actual crew handling time (Tr. 2-138).

In discussing the operating expense which he said would apply to 2¼ times the crew wage, it did not necessarily mean that all of the operating expense was an added expense, because it was reasonable to assume another president would not be required, nor another yard master, or an additional interlocking man, as the services of those men were already included in other operating expense; that the added expense would be the coal, water and oil that is required for the movement of the caboose and the maintenance of the caboose, and that the approximate amount of 2¼ times the crew wages as operating expense simply meant that there would be a paper shift or a record shift of the allocation of various costs that were used in making up the operating expense (Tr. 2-135).

Mr. Thomas testified that there were two cross overs on the approach to the Eads bridge in Illinois (Tr. 2-141), and Mr. Charles Jenkins testified (Tr. 2-28) that there was an approach to the Merchants bridge in Illinois, which was never rebutted.

Mr. Thomas testified that in photograph #2 (Tr. 2-235), the man is standing on top of a drawbar and has a hold of the ladder or brake staff of the car. There is a hazard in standing there, and he then referred to a detail of the drawbar, the footing and the hand-holds, and the position in which the man has to stand when riding in such a position.

The method in which he has to secure himself is not very good, and the footing that he has is not safe, and these hazards or dangers could be eliminated by providing a caboose for the man to ride in (Tr. 2-141).

Mr. Thomas goes into detail concerning the numerous vertical and horizontal insufficient clearances and equipment used on the bridges and testified to the hazards and unsafe conditions under which the men were compelled to operate. As an illustration he selected the last car which was 15 feet in height and from the diagram of the situation shown on the Eads bridge he found the vertical clearances to be 16' 2", so that the distance between the top of the running board and the fixed obstruction is 1' 2". The distance of 1' 2" is hardly sufficient room for a switchman to stand on the top of this car. *Hence the need of a caboose to safeguard the very life of the switchman.*

He further mentions that taking into consideration the smallest car that was observed at that point, which was 12' 10" in height, the clear distance between the running board and the fixed obstruction was 3' 4". The distance of 3' 4" is hardly sufficient room for a switchman to stand on the top of even the smallest car. *Hence the need of a caboose.*

He further testified that taking the narrowest car that was observed, which was 10' in width, one-half of the width of the car is 5 feet and it will extend 5 feet each way from the center line of the track. Deducting 5 feet or one-half of the width of the car from the distance to the north of the north track, which is 6' 5¾", we have 1' 5¾" clearance between the side of the car and the fixed obstruction. The distance of 1' 5¾" clearance between the side of the car and the fixed obstruction is hardly enough room for the switchman to stand on the side of the car. *Hence the need for a caboose.*

He further testified that taking the widest car observed, which was 10' 10", the distance will be reduced by 5 inches and the clear distance will then only be 1' 3¼". The distance of 1' 3¼" is hardly sufficient room for the switchman to stand on the side of that car. *Hence the need of a caboose* (Tr. 2-145).

He testified in detail about the insufficient clearances and also mentioned that the clearances did not take into account any sway or rocking of the cars that occurs during the time the cars are in motion, which appeared to be approximately 2 inches of sway or rocking of the cars at the rate of speed those trains were being operated (Tr. 2-146). It should be borne in mind that Mr. Thomas' testimony was never rebutted except for a general denial.

He further testified that the clearances were inadequate and insufficient to guard the safety of the switchmen (Tr. 2-147). The switchmen were then compelled to ride on the rear drawbar of the car, as will be noted from examination of the photographs showing the hazards and dangers (Tr. 2-255, 257, 258, etc.). The insufficient clearances can be observed from the examination of the photographs (Tr. 2-256, 258, 260, 261, etc.).

The record discloses without contradiction that at every test made there were four men checking: a member of the Brotherhood, Mr. Butler (assistant to Mr. Thomas), Mr. Thomas, *and an official* of the Railroad (Tr. 1-201).

The evidence clearly shows that on runs other than the bridge runs the rear switchman was compelled to ride the drawbar at the trailing end of the rear car. If the end of the car on which he was riding happened to be the end that was provided with a brake staff, the switchman would grasp it as a means to secure himself in place, and if not, he would reach farther toward the side of the car in order to reach the end ladder or hand-holds (Tr. 2-227).

With the use of a caboose the flagman can take his position in such caboose during the course of interchange or transfer operations, which would preclude the necessity of his riding on the drawbar, top or side of the rear car (Tr. 2-227).

The accommodations provided by caboose or shelter car include heat, shelter from the elements, a place to store flagging and other equipment, lunches, wearing apparel, and the like (Tr. 2-227).

In the summary of Mr. Thomas' report it appears that the annual crew wages for handling cabooses would amount to $27,777.22 (Tr. 2-266); that the number of cabooses required would be 36 (Tr. 2-266) at a cost of $1,233.69 each (Tr. 2-210), or a total of approximately $44,000.00.

It should be noted that the cost per caboose at $1,233.69 is not the figure estimated by the Commission's Expert, but is the cost as estimated by the appellant itself. (Tr. 2-241).

As to caboose delay time for round trips, the record shows conclusively, from actual tests made by the Commission's Expert, *in conjunction with an official of the railroad,* that the said delay time was nothing in one instance, two minutes in two other cases, eight minutes in one case, ten minutes in another, and seventeen minutes in a further one (Tr. 2-224), and that as to the other runs, the time was practically the same (Tr. 2-246, 247, 264).

The actual cost of the caboose was given by the railroad itself, and caboose time delay was checked by an official of the railroad on all tests, and the crew wages are known to the officials of appellant. The testimony of Mr. Thomas was not refuted and Mr. Thomas was not even cross-examined on these points.

Now let us see where and how Mr. Davis, superintendent of the appellant, got his figures of $400,000.00, divided into $150,000.00 for new cabooses and $250,000.00 on account

of added expense due to delays, etc. Mr. Davis in a general way testified to a 40-minute round trip delay as against the Commission's Expert's actual test made in conjunction with an official of the appellant, showing the delay to be from nothing in one instance and then from two minutes to seventeen minutes in other instances. He stated that this delay would cost $10.00 each round trip and that if cabooses were granted the cost for the first year would be the greatest, $400,000.00. That is all the testimony in this connection and was made after objection by counsel as follows:

> "Mr. Schwarzbach: I object to that as being a conclusion. There is no foundation laid for it" (Tr. 2-114).

There was absolutely no basis for the 40-minute delay or cost of $10.00 per run.

Counsel for appellant would have us believe this kind of evidence as against the testimony of the Commission's Expert whose tests were *at all times* made in conjunction with an official of appellee. Mr. Davis admitted (Tr. 2-197) that there was an official of the Terminal with Mr. Thomas at all times when the tests were made and stated that Mr. J. A. Matheson, Jr., was the official who made all the tests with Mr. Thomas and that a report of the test runs was made to appellee's office.

Mr. Davis' testimony is based upon hearsay as illustrated when he said (Tr. 2-198):

> "When I say there is a delay of one hour in the Pennsylvania yard, I do not know that of my own knowledge. I am taking their word for it."

Mr. Davis admitted that the appellant furnishes about 31 cabooses now, showing the necessity of cabooses to properly protect the safety of the switchmen (Tr. 2-113).

Mr. L. E. Knight, witness for appellant, who according to counse for appellant, corroborated Mr. Davis, admitted that he kept a record of every caboose put on and that he

timed everything from the time the engineer was riding until the work was completed (Tr. 2-194). Mr. L. E. Knight was very indefinite on the caboose delay, stating it would take 12, 15, maybe 20 minutes, then stated six to 12 minutes (Tr. 2-183, 184).

Mr. Walter H. Rolen, another witness for appellant, who is supposed to have corroborated Mr. Davis, on cross-examination changed his testimony by admitting that the only caboose delay would be the time the engine would require to get the caboose, take it and place it, and that coupling up the air brakes would not be charged to caboose delay (Tr. 2-175), and that it would take the engine three or four minutes to run both ways of a 45-car length (Tr. 2-176).

Mr. Leslie W. Cheatham, a switchman since May, 1920, testified to the various hazards from Madison yard to Granite City (all within Illinois); shoving down the railroad, which is very hazardous, as follows:

> "We shove down and cannot see. The head man cannot see the rear man or flagman. I have had cars break off and roll down and it was impossible to stop them. I have been on that run and had to run ahead of the cars to protect the public. We do not have air brakes and couplings on these runs all the time" (Tr. 2-34, 35).

He further testified that if they had a caboose on this run, with air brakes properly working, the rear man would be able to stop in case of emergency (Tr. 2-35). This is just one instance of the dangers not only to the switchman but to the public.

He further testified to other runs, showing various hazards including the insufficient vertical and horizontal clearances other than the bridge runs within the confines of the State of Illinois, the dangers of which could be eliminated by the use of a caboose (Tr. 2-35, 36).

The record is replete with testimony showing the various hazards and dangers incurred by the switchmen in the

performance of their duties and the necessity of cabooses to eliminate said hazards and dangers, including therein the insufficient vertical and horizontal clearances on all runs within yards in the State of Illinois and over the Eads and Merchants bridges within the confines of the State of Illinois.

Testimony along these lines was furnished by William O. Satterfield, a switchman for over 16 years and assigned to the C. D. yard (Tr. 2-45 to 59, inclusive). He testified that the clearances and other hazards, even those other than the bridge runs, could be eliminated by a caboose which would eliminate the hazards incurred by close clearances, of signals, bridge signals, etc., and would afford better protection in observing the train, in cutting off and throwing switches; that it would prevent the switchmen from being knocked off the top of the cars from insufficient clearances or when the train is making sudden stops or sudden starts; that it would afford protection in the event the trains break off on stiff inclines, for with a properly equipped caboose you would have the protection of air brakes; that it would afford the protection of being better able to do the work on account of inclement weather, such as sleet, snow and ice, which sometimes are on the grab irons of the cars or on the tops of the cars, when they have to get down to throw switches; that it would not be necessary to ride the drawbar, or on the sill where the drawbar is fastened onto the car, that being a dangerous position under any conditions of weather. It would allow the switchman to prevent anyone from running into the hind end of the train when you had to stop on curves where you would not be observed for long distances. Property equipment such as first aid could be carried in the caboose in case of emergency (Tr. 2-56, 57).

The evidence also shows that other railroads operating runs parallel with the respondent's and railroads using

some of the same tracks of the appellant operate with cabooses.

To the same effect as these other witnesses was the testimony of Fritz Rousch, a switchman for eighteen years (Tr. 2-71), John Cox, a switchman since 1925 (Tr. 2-72), George H. Cox, a switchman for sixteen years (Tr. 2-75), Thomas Strike, a switchman for twenty-one years (Tr. 2-81), William A. Bruce, a switchman for 49 years (Tr. 2-84), R. F. Blackman, roadman for 29 years (Tr. 2-85). It is interesting to note that the testimony of the appellant's witnesses was all general, whereas the testimony of expert witness and witnesses for the appellee was very specific and definite.

We respectfully submit that it is not only the accidents that have actually occurred that prove our contention, but the potential hazards and the dangers and hazards to which the men are and will continue to be subjected.

It has never been contended that appellant was insolvent or that the outlay of any sum for the purchase of additional cabooses would render it insolvent.

If appellant elects to operate freight trains and employs switchmen in connection therewith it cannot evade its duty imposed by law to furnish all reasonable means and methods to protect its crews against hazards, accidents and injuries.

The cost involved we submit is insignificant compared to the good achieved and to be achieved by the order entered by the Illinois Commerce Commission in providing for cabooses so as to avoid not only the accidents that occur but also to avoid the dangers and hazards to which the switchmen are subjected.

In view of the facts and circumstances of this case, it is respectfully submitted that the expense to which the appellant will be put in order to comply with the order of the Commission is not so exorbitant when compared

with the great benefits to accrue therefrom, as to deprive appellant of its property without due process of law.

Conclusion and Motion.

In view of the foregoing it is respectfully submitted that the only Federal questions raised by the appellant are not only without substance but have been repeatedly passed upon by this Court contrary to the appellant's position.

The appellees therefore pray that this Court either dismiss the said appeal for want of a substantial Federal question, or, in the alternative, that the judgment of the Supreme Court of the State of Illinois be affirmed by this Honorable Court at this stage of the proceedings.

Respectfully submitted,

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